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Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of )

Application by SBC Communications Inc., )  
Nevada Bell Telephone Company, and )southwestern Bell Communications Services, )  
Inc., for Authorization To Provide In-Region, )  
InterLATA Services in Nevada )

WC Docket No. 03 -10

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### MEMORANDUM OPINION AND ORDER

Adopted: April 14, 2003

Released: April 14, 2003

By the Commission: Commissioners Martin and Adelstein issuing separate statements;  
Commissioner Copps concurring and issuing a statement.

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### **I. INTRODUCTION**

1. On January 14, 2003, SBC Communications Inc. and its subsidiaries, Nevada Bell Telephone Company, and southwestern Bell Communications Services, Inc. (collectively, Nevada Bell or Applicant) filed this application pursuant to section 271 ~~of~~ the Communications Act of 1934, as amended,<sup>1</sup> for authority to provide in-region, interLATA service originating in the State of Nevada.<sup>2</sup> We grant Nevada Bell's application in this Order based on our conclusion that Nevada Bell has taken the statutorily required steps to open its local exchange markets in Nevada to competition.

2. Nevada Bell serves only a portion of the lines in Nevada, and its serving area is characterized by low population density and few urban centers.<sup>3</sup> Nevada Bell serves just over 371,000 access lines in an area encompassing approximately 48,000 square miles.<sup>4</sup> Even

<sup>1</sup> We refer to the Communications Act of 1934, as amended by the Telecommunications Act of 1996 and other statutes, as the Communications Act or the Act. *See* 47 U.S.C. §§ 151 *et seq.* We refer to the Telecommunications Act of 1996 as the 1996 Act. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

<sup>2</sup> *See Application by SBC Communications Inc., Nevada Bell Telephone Company, and Southwestern Bell Communications Services, Inc./or Provision of In-Region, InterLATA Services in Nevada*, WC Docket No. 03-10 (filed Jan. 14, 2003) (Nevada Bell Application).

<sup>3</sup> Nevada Bell Application at 7.

<sup>4</sup> *Petition for Review and Approval of the Draft Application by SBC Communications, Inc., Nevada Bell Telephone Company and Southwestern Bell Communications Services, Inc. d/b/a Nevada Bell Long Distance, or Provision of In-Region InterLATA Services in Nevada*, Recommendation in Support of Nevada Bell Telephone Company's Application to the Federal Communications Commission for Provision of In-Region, InterLATA Services in Nevada, P.U.C.N. Docket No. 00-7031, at 26 (Dec. 17, 2002) (*Nevada Commission Order*).

including the most populous city, Las Vegas, which is not in Nevada Bell's serving area, Nevada is one of the most sparsely populated states in the nation.'

3. In granting this application, we wish to acknowledge the effort and dedication of the Nevada Public Utilities Commission (Nevada Commission), for the significant time and effort expended in overseeing Nevada Bell's implementation of the requirements of section 271. The Nevada Commission reviewed Nevada Bell's section 271 compliance in open proceedings with ample opportunities for participation by interested third parties. In addition, it adopted a comprehensive Performance Measurement Plan, as well as a Performance Incentives Plan (PIP) designed to create a financial incentive for post-entry compliance with section 271.<sup>6</sup> As the Commission has recognized, state proceedings demonstrating a commitment to advancing the pro-competitive purpose of the Act serve a vitally important role in the section 271 process.'

## II. BACKGROUND

4. In the 1996 amendments to the Communications Act, Congress required that the Bell Operating Companies (BOCs) demonstrate compliance with certain market-opening requirements contained in section 271 of the Act before providing in-region, interLATA long distance service. Congress provided for Commission review of BOC applications to provide such service in consultation with the affected state and the Attorney General.'

5. On July 24, 2000, Nevada Bell filed its draft section 271 application to provide in-region, interLATA service, with the Nevada Commission. Because of the Nevada Commission's reliance on Pacific Bell's operations support system (OSS) testing in California, the Nevada

<sup>5</sup> Nevada Bell Application at 7; Nevada Bell Application App. A, Vol. 5, Tab 19, Affidavit of J. Gary Smith, (Nevada Bell Smith Aff.) at para. 4; Nevada Commission Order at 26. See also Federal Communications Commission, *Statistics of Communications Common Carriers*, Tables 2.1 and 2.4 (2002).

<sup>6</sup> Nevada Bell Application App. A, Vol. 3, Tab 11, Affidavit of Daniel O. Jacobsen (Nevada Bell Jacobsen Aff.) at para. 40; Nevada Commission Order at 207-13

<sup>7</sup> See, e.g., *Application of Verizon New York Inc., Verizon Enterprise Solutions, Verizon Global Networks Inc. and Verizon Select Services, Inc. for Authorization To Provide In-Region, InterLATA Services in Connecticut*, CC Docket No. 01-100, Memorandum Opinion and Order, 16 FCC Rcd 14147, 14149, para. 3 (2001) (*Verizon Connecticut Order*); *Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) and Verizon Global Networks Inc. for Authorization To Provide In-Region, InterLATA Services in Massachusetts*, CC Docket No. 01-9, Memorandum Opinion and Order, 16 FCC Rcd 8988, 8990, para. 2 (2001) (*Verizon Massachusetts Order*).

<sup>8</sup> The Commission has summarized the relevant statutory framework in prior orders. See, e.g., *Join! Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, CC Docket No. 00-217, Memorandum Opinion and Order, 16 FCC Rcd 6237, 6241-42, paras. 7-10 (2001) (*SWBT Kansas/Oklahoma Order*), *aff'd in part, remanded in part sub nom. Sprint Communications Co. v. FCC*, 774 F.3d 549 (D.C. Cir. 2001); *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, CC Docket No. 99-295, Memorandum Opinion and Order, 15 FCC Rcd 3953, 3961-63, paras. 17-20 (1999) (*Bell Atlantic New York Order*), *aff'd, AT&T Corp. v. FCC*, 220 F.3d 607 (D.C. Cir. 2000).

Commission divided the proceeding into two phases.’ The first phase encompassed hearings and a collaborative workshop only upon those checklist items that did not **rely** on the result of OSS testing in California.” The second phase, commenced after the completion of the California OSS testing, encompassed checklist items that relied on the California results.” In addition, after the release of the California **OSS** test results in December 2000, Nevada Bell engaged Pricewaterhouse Coopers (PwC) to attest that Nevada Bell’s and Pacific Bell’s **OSS** met the “sameness” standards set out in the *SBC Kansas/Oklahoma Order*.”

6. On December 17, 2002, the Nevada Commission released its recommendation concluding that Nevada Bell had successfully complied with the 14 checklist items set out in section 271. The Nevada Commission also determined that Nevada Bell had demonstrated the “sameness” of its **OSS** with that of Pacific Bell in California, utilizing the roadmap and standard established by the Commission.” On the issue of whether Nevada Bell satisfied the requirements of section 271(c)(1)(A) (Track A), the Nevada Commission noted that Nevada Bell had made the showing that at least two facilities-based competitive local exchange carriers (LECs) provide primarily facilities-based service to business carriers, and several competing carriers provide

<sup>9</sup> Nevada Bell Jacobsen Aff. at para. 52; *Nevada Commission Order* at 18.

<sup>10</sup> Phase One hearings were conducted in October through early December 2000. The issues addressed included the following topics: State Regulatory Background; Number Administration; Wholesale Account Management; Poles, Ducts, Conduits and Rights-of-way; Billing; Operator Services/Directory Assistance/White Pages; State of Competition; Network; and Wholesale Policy. In December 2000, after completion of the hearings, parties participated in a collaborative process that was facilitated by Nevada Commission staff, and focused mainly on checklist items three (Poles, Ducts, Conduits and Rights-of-way), nine (Numbering Administration), twelve (Local Dialing Parity) and thirteen (Reciprocal Compensation). Nevada Bell Jacobsen Aff. at para. 53.

<sup>11</sup> Phase Two of the Nevada Commission proceedings was further subdivided into two subphases: A and B. The hearing in Phase Two-A was conducted on April 9, 10, and 11, 2001, and covered the following topics: Public Interest; Accounting Safeguards; Economic Impacts; and Section 272 Compliance. Nevada Bell Jacobsen Aff. at para. 54; *Nevada Commission Order* at 22. The Nevada Commission conducted the hearing in Phase Two-B on October 22, 2001, which covered the following topics: Structural Separation of Advanced Services; Wholesale Provisioning of Advanced Services; Performance Measures and Incentives; Operations Support Systems; Local Number Portability; and “Sameness” of OSS between California and Nevada. At the hearing, the participating parties presented an oral stipulation of the parties which, among other things, requested that the Nevada Commission close the evidentiary record by accepting the testimony that had been filed, and reserve an exhibit number for the document to be issued by the California Commission as the final order on Pacific Bell’s section 271 application or a final decision on Pacific Bell’s OSS. The stipulation also provided that upon Nevada Bell filing this exhibit, the parties would file briefs and reply briefs on the entire Nevada section 271 proceeding. Nevada Bell Jacobsen Aff. at para. 58; *Nevada Commission Order* at 24.

<sup>12</sup> Nevada Bell Jacobsen Aff. at para. 61

<sup>13</sup> *Nevada Commission Order* at 52; see also *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6288-91, paras. 111-16; *Application by SBC Communications Inc., Pacific Bell Telephone Company, and Southwestern Bell Communications Services Inc., for Authorization To Provide In-Region InterLATA Services in California*, WC Docket No. 02-306, Memorandum Opinion and Order, 17 FCC Rcd 25650, 25685-90, paras. 72-80 (2002) (*Pacific Bell California Order*).

service to residential subscribers pursuant to resale." Although the Nevada Commission expressed its belief that such a showing would satisfy the requirements of Track A, it deferred that determination to this Commission.<sup>15</sup>

7. The Department of Justice filed its evaluation on February 21, 2003, recommending approval of the Nevada Bell application.<sup>16</sup> The Department of Justice concludes that, given the levels of entry in Nevada for business customers, the absence of any evidence that Nevada Bell has behaved anticompetitively, and the evidence concerning Pacific Bell's California OSS, opportunities are available for competitive carriers to serve business customers in Nevada." The Department of Justice also concludes that, based on the absence of competitive carrier complaints in this proceeding, and the evidence concerning Pacific Bell's California OSS, Nevada Bell has fulfilled its obligations to open its markets to residential competition.<sup>18</sup> On the issue of whether Nevada Bell has satisfied the statutory requirements of Track A, the Department of Justice "defer[s] to the Commission's expert judgment in interpreting its own statute."

### III. PRIMARY ISSUES IN DISPUTE

8. In a number of prior orders, the Commission discussed in considerable detail the analytical framework and particular legal showing required to establish checklist compliance." In this Order, we rely upon the legal and analytical precedent established in those prior orders. In addition, we include comprehensive appendices containing performance data and the statutory framework for evaluating section 271 applications." In reviewing this application, we examine

<sup>14</sup> Nevada Commission Order at 53

<sup>15</sup> Nevada Commission Order at 55.

<sup>16</sup> Department of Justice Evaluation at 2. Section 271(d)(2)(A) requires us to give "substantial weight" to the Department of Justice's evaluation. 47 U.S.C. § 271(d)(2)(A).

<sup>17</sup> Department of Justice Evaluation at 6

<sup>18</sup> Department of Justice Evaluation at 6.

<sup>19</sup> Department of Justice Evaluation at 7.

<sup>20</sup> See, e.g., Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services Inc., d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996, To Provide In-Region, InterLATA Services in Texas, CC Docket No. 00-65, Memorandum Opinion and Order, 15 FCC Rcd 18354, 18359-61, 18365-78, paras. 8-11, 21-40, 43-58 (2000) (SWBT Texas Order); Bell Atlantic New York Order, 15 FCC Rcd at 3961-63, 3966-69, 3971-76, paras. 17-20, 29-37, 43-60; see also Appendix D.

<sup>21</sup> See generally Appendices B (Nevada Performance Data), C (California Performance Data), and D (Statutory Requirements). See also Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization To Provide In-Region, InterLATA Services in Rhode Island, CC Docket No. 01-324, Memorandum Opinion and Order, 17 FCC Rcd 3300, Apps. B, C, and D (2002) (Verizon Rhode Island Order); Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance Pursuant (continued...)

performance data as reported in monthly performance reports reflecting service in the period of September 2002, through January 2003.

9. We focus in this Order on the issues in controversy in the record. Accordingly, we begin by addressing whether we should waive our procedural rules and consider Nevada Bell's late-filed evidence regarding Track A, and whether the application qualifies for consideration under Track A. Next, we address checklist item two (Unbundled Network Elements, or UNEs), checklist item four (unbundled local loops) and checklist item one (interconnection). The remaining checklist items 3 and 5 through 14 are discussed only briefly, as they received no attention from commenting parties. We also discuss issues concerning compliance with section 272 and the public interest requirements.

#### A. Complete-As-Filed Waiver

10. Before evaluating Nevada Bell's compliance with the requirements of section 271, we discuss why we accord evidentiary weight to the Nevada Bell survey and affidavits regarding the broadband Personal Communications Service (PCS) provider Cricket Communications that Nevada Bell filed on day 31 to support its Track A arguments. The Commission maintains certain procedural requirements governing BOC section 271 applications." In particular, the "complete-as-filed requirement provides that when an applicant files new information after the comment date, the Commission reserves the right to start the 90-day review period again or to accord such information no weight in determining section 271 compliance." We maintain this requirement to afford interested parties a fair opportunity to comment on the BOC's application, to ensure that the Attorney General and the state commission can fulfill their statutory consultative roles, and to afford the Commission adequate time to evaluate the record." The Commission can waive its procedural rules, however, "if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest."<sup>25</sup>

(Continued from previous page)

*to Section 271 of the Telecommunications Act of 1996 To Provide In-Region InterLATA Services in Arkansas and Missouri*, CC Docket No. 01-194, Memorandum Opinion and Order, 16 FCC Rcd 20719, Apps. B, C, and D (2001) (*SWBT Arkansas/Missouri Order*); *Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Network Inc., and Verizon Select Services Inc. for Authorization To Provide In-Region, InterLATA Services in Pennsylvania*, CC Docket No. 01-138, Memorandum Opinion and Order, 16 FCC Rcd 17419, 17508-545, Apps. B and C (2001) (*Verizon Pennsylvania Order*).

<sup>22</sup> See *Updated Filing Requirements for Bell Operating Company Applications Under Section 271 of the Communications Act*, Public Notice, DA 01-734 (CCB rel. Mar. 23, 2001) (*Mar. 23, 2001 Public Notice*).

<sup>23</sup> See *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6247, para. 21.

<sup>24</sup> See *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended. To Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-137, Memorandum Opinion and Order, 12 FCC Rcd 20543, 20572-73, paras. 52-54 (1997) (*Ameritech Michigan Order*).

<sup>25</sup> *Northeast Cellular Tel. Co. v. FCC*, 597 F.2d 1164, 1166 (D.C. Cir. 1990); *WAT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969); see also 47 U.S.C. § 154(j); 47 C.F.R. § 1.3.

11. For reasons discussed below, we waive the complete-as-filed requirement pursuant to Nevada Bell's request<sup>26</sup> to the extent necessary to consider Nevada Bell's late-filed Track A evidence. We first conclude that the special circumstances before us warrant a deviation from the general rules for consideration of late-filed information. Nevada Bell responded to criticism in the record regarding its showing as to whether Cricket Communications' broadband PCS offering satisfied the requirements of Track A.<sup>27</sup> We note that Nevada Bell responded expeditiously to such criticisms by submitting explanatory evidence with regard to Cricket Communication's market presence in Nevada and whether Nevada customers were substituting Cricket's service for their wireline telephone service

12. This is not a situation in which the BOC has attempted to maintain high rates or other anticompetitive conditions only to modify the rates or terms at the last minute in order to gain section 271 approval. The evidence Nevada Bell submitted was factual in nature, and existed regardless of whether and when Nevada Bell commissioned the study to discern the extent of Cricket's market presence. Thus, this appears to be a case where the Applicant has submitted additional evidence to respond quickly and positively to concerns raised in the record, rather than strategically delayed taking actions necessary to comply with the statute at the expense of commenting parties and Commission staff. Moreover, the evidence Nevada Bell submitted was straightforward to evaluate. Because the evidence was filed on day 31, the Bureau had sufficient time to place the evidence on public notice and request comments specific to the evidence submitted.<sup>28</sup> The Department of Justice was able to consider this evidence" and parties to the proceeding were able to file comments on the additional Track A evidence, allowing the Commission to fully evaluate this evidence in considering Nevada Bell's application." Indeed, no party objected to the late-filed nature of the evidence and the only party submitting reply comments addressed Nevada Bell's Track A evidence." Thus, we see no reason to believe that submission of Nevada Bell's Track A evidence in any way prejudiced any party to the proceeding or diminished the ability of the Commission to evaluate the application.<sup>32</sup> Under these circumstances, we believe that consideration of Nevada Bell's additional evidence better serves the Commission's interest in ensuring a fair and orderly 271 process than restarting the 90-day clock.

<sup>26</sup> Nevada Bell Track A Reply at 15.

<sup>27</sup> See WorldCom Comments at 5-7,

<sup>28</sup> *Comments Requested Regarding SBC's Track A Reply Comments in Connection with SBC's Pending Section 271 Application*, Public Notice, DA 03-461 (WCB rel. Feb. 14, 2003).

<sup>29</sup> Department of Justice Evaluation at 7-8

<sup>30</sup> See WorldCom Reply Comments at 5-8,

<sup>31</sup> See WorldCom Reply Comments at 5-8.

<sup>32</sup> See, e.g., *Verizon Rhode Island Order*, 17 FCC Rcd at 3307, para. 9

13. We also conclude that grant of this waiver will serve the public interest and thus will satisfy the second element of the waiver standard described above. Grant of this waiver credits Nevada Bell's affirmative response to questions in the record concerning its Track A evidentiary showing and its otherwise persuasive section 271 application. In addition, grant of this waiver permits the Commission to act on this section 271 application quickly and efficiently, without the delays inherent in restarting the 90-day clock. Given that interested parties have had an opportunity to comment on this evidence, we do not believe that the public interest would be served in this instance by strict adherence to our procedural rules.

## B. Compliance With Section 271(c)(1)(A)

14. In order for the Commission to approve a BOC's application to provide in-region, interLATA services, the BOC must first demonstrate that it satisfies the requirements of either section 271(c)(1)(A) (Track A) or section 271(c)(1)(B) (Track B).<sup>33</sup> To meet the requirements of Track A, a BOC must have interconnection agreements with one or more competing providers of "telephone exchange service .. to residential and business subscribers." In addition, the Act states that "such telephone service may be offered ...either exclusively over [the competitor's] own telephone exchange service facilities or predominantly over [the competitor's] own telephone exchange facilities in combination with the resale of the telecommunications services of another carrier." The Commission has concluded that section 271(c)(1)(A) is satisfied if one or more competing providers collectively serve residential and business subscribers,<sup>36</sup> and that unbundled network elements *are* a competing provider's "own telephone exchange service facilities" for purposes of section 271(c)(1)(A).<sup>37</sup> The Commission has further held that a BOC must show that at least one "competing provider" constitutes "an actual commercial alternative to the BOC,"<sup>38</sup> which a BOC can do by demonstrating that the provider serves "more than a *de minimis* number" of subscribers.<sup>39</sup> The Commission has held that Track A does not require any particular level of market penetration and the United States Court of Appeals for the District of

<sup>33</sup> 47 U.S.C. § 271(c)(1); Appendix D at paras. 15-16

<sup>34</sup> *Id.*

<sup>35</sup> 47 U.S.C. § 271(c)(1)(A).

<sup>36</sup> *Ameritech Michigan Order*, 12 FCC Rcd at 20589, para. 85; *see also Application by BellSouth Corporation, et al., Pursuant to Section 271 of the Communications Act of 1934, as Amended, To Provide In-Region, InterLATA Services in Louisiana*, CC Docket No. 98-121, Memorandum Opinion and Order, 13 FCC Rcd 20599, 20633-35, paras. 46-48 (1998) (*BellSouth Second Louisiana Order*).

<sup>37</sup> *Ameritech Michigan Order*, 12 FCC Rcd at 20598, para. 101

<sup>38</sup> *Application by SBC Communications Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Oklahoma*, CC Docket No. 97-121, Memorandum Opinion and Order, 12 FCC Rcd 8685, 8695, para. 14 (1997) (*SWBT Oklahoma Order*).

<sup>39</sup> *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6257, para. 42; *see also Ameritech Michigan Order* 12 FCC Rcd at 20585, para. 78.



Columbia has affirmed that the Act "imposes no volume requirements for satisfaction of Track A."<sup>40</sup>

15. We conclude that Nevada Bell satisfies the requirements of Track A in Nevada. The Nevada Commission, although it developed a factual record and believed Nevada Bell satisfied Track A, deferred the issue of Nevada Bell's compliance with Track A requirements to the Commission.<sup>41</sup> Nevada Bell relies on interconnection agreements with Advanced Telecom Group, WorldCom, and Cricket Communications in support of its Track A showing.<sup>42</sup> These interconnection agreements are "...binding agreements that have been approved under section 252 specifying the terms and conditions under which [Nevada Bell] is providing access and interconnection to its network facilities ..."<sup>43</sup> as required under section 271(c)(1)(A). We find that Advanced Telecom Group and WorldCom each serve more than a *de minimis* number of business end users predominantly over their own facilities and represent "actual commercial alternatives" to Nevada Bell for business telephone exchange services.<sup>44</sup> As we explain further below, we find that Cricket Communications, a PCS provider, serves more than a *de minimis* number of residential users over its own facilities and, for purposes of section 271 compliance, represents an actual commercial alternative to Nevada Bell for residential telephone exchange services.<sup>45</sup>

<sup>40</sup> *Sprint v. FCC*, 274 F.3d at 553-54; see also *SBC Communications Inc. v. FCC*, 138 F.3d 410,416 (D.C. Cir. 1998) ("Track A does not indicate just how much competition a provider must offer in either the business or residential markets before it is deemed a 'competing' provider.").

<sup>41</sup> *Nevada Commission Order* at 55. The Nevada Commission concluded that WorldCom and ATG provide facilities-based service to business customers and that other carriers provide resale service to residential customers. *Id.*

<sup>42</sup> Nevada Bell Jacobson Aff., Attach. D: Nevada Bell Smith Aff. at para. 5

<sup>43</sup> 47 U.S.C. § 271(c)(1)(A)

<sup>44</sup> Nevada Bell Smith Aff. at para. 5; Nevada Bell Smith Aff., Attach. D (*citing confidential information*). Nevada Bell estimates that competing LECs now serve at least 37,700 business access lines in Nevada. Nevada Bell Smith Aff. at para. 10.

<sup>45</sup> Because we conclude that Nevada Bell has satisfied Track A through its showing for Cricket Communications, we do not need to determine whether the other competitive carriers Nevada Bell cites serve more than a *de minimis* number of residential subscribers sufficient to satisfy Track A. Nevada Bell Smith Aff. at paras. 11-13; Nevada Bell Supplemental Track A Reply at 5-8, 11-13; Nevada Bell Supplemental Track A Reply. Reply Affidavit of J. Gaw Smith at paras. 4-9 (*Nevada Bell Smith Reply Aff.*); Department of Justice Evaluation at 7-9; see *contra* WorldCom Comments at 2; WorldCom Reply at 1-5; Letter from Keith Seat, Senior Counsel – Federal Advocacy, WorldCom, to Marlene H. Donch, Secretary, Federal Communications Commission, WC Docket No. 03-10, at 1 (filed Mar. 25, 2003) (WorldCom Mar. 25 *Ex Parrr* Letter).

**1. Broadband PCS Constitutes Telephone Exchange Services for Purposes of Section 271(c)(1)(A)**

16. The Commission has previously determined that broadband PCS<sup>46</sup> satisfies the statutory definition of a telephone exchange service for section 271(c)(1)(A) purposes, and that broadband PCS may form the basis of a Track **A** finding." In the *BellSouth Second Louisiana Order*, the Commission found that the broadband PCS service at issue there constitutes a telephone exchange service for purposes of Track **A**, notwithstanding the different technical configuration, service characteristics, and service charges of broadband PCS and wireline service.<sup>48</sup> Similarly, here we find that Cricket Communications' residential broadband PCS offering in Nevada also is a "telephone exchange service" for purposes of Track **A**.<sup>49</sup> The Commission recognized at that time that broadband PCS provides some advantages and disadvantages over wireline telephone services. For instance, consumers may be willing to pay a premium for broadband PCS in light of the benefits of mobility." We reject WorldCom's argument that the price premium for broadband PCS or the technical differences between broadband PCS service and traditional wireline service (*e.g.*, slower transmission speed for data or inability to have multiple handsets for the same phone number) should exclude a consideration of broadband PCS as a telephone exchange service for Track **A** purposes." The limitations listed by WorldCom are not new limitations to broadband PCS and were features of the BellSouth broadband PCS service that the Commission concluded in 1998 constituted a telephone exchange service for purposes of section 271(c)(1)(A).<sup>52</sup> As in the *BellSouth Second Louisiana Order*, while there are certain technical and functional differences between broadband PCS and wireline exchange service we conclude, based on the current record, that these differences are not sufficient to prevent Cricket's broadband PCS offering from fitting within the definition of telephone exchange service for purposes of section 371. Nor do we see any other reason to reconsider our finding that a Track **A** compliance can be based on a broadband PCS provider.

17. In the *BellSouth Second Louisiana Order*, the Commission determined that to satisfy Track **A**, a BOC must show that consumers are using broadband PCS in lieu of and not as

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<sup>46</sup> Broadband PCS refers to mobile telephony service authorized in the 1850-1910 and 1930-1990 MHz bands. 47 C.F.R. § 24.200.

<sup>47</sup> *BellSouth Second Louisiana Order*, 13 FCC Rcd at 20606, 20622-23, paras. 11, 29-30.

<sup>48</sup> *BellSouth Second Louisiana Order*, 13 FCC Rcd at 20622, para. 29.

<sup>49</sup> *BellSouth Second Louisiana Order*, 13 FCC Rcd at 20622-23, paras. 29-30.

<sup>50</sup> *BellSouth Second Louisiana Order*, 13 FCC Rcd at 20621, para. 32.

<sup>51</sup> WorldCom Comments at 6-7; WorldCom Reply at 7; WorldCom Mar. 25 *Ex Parte* Letter at 2-3.

<sup>52</sup> Nevada Bell Track **A** Reply at 9; WorldCom Comments at 6-7. See *BellSouth Second Louisiana Order*, 13 FCC Rcd at 20621-22, 20624, paras. 28-29, 32.

a supplement to their wireline telephone service? The Commission found that relevant evidence could include studies identifying customers that had used broadband PCS in lieu of wireline service, as well as marketing efforts by broadband PCS providers designed to induce replacement of wireline service with broadband PCS service.” The Commission noted that the persuasive value of any study would depend upon the quality of the survey and statistical methodology used in the study.<sup>55</sup> The Commission also indicated that a survey used for this purpose should include a question asking the respondent whether he or she subscribes to a wireline service **or** should otherwise verify that the subscriber does not have a wireline service.”

## 2. Nevada Bell’s Broadband PCS Evidence

18. We find that the evidence submitted by Nevada Bell adequately demonstrates that more than a *de minimis* number of Cricket customers use their service in lieu of wireline telephone service. The record shows that Cricket’s marketing efforts stress that its product is a substitute for residential local telephone service. Further, we find that Nevada Bell’s survey also demonstrates that Cricket customers use Cricket service in lieu of wireline telephone service. In particular, we find that the survey was random, contains statistical analysis of sufficient quality to allow us to rely on it for the purpose of showing compliance with Track A, and suffers from none of the fundamental flaws discussed in the *BellSouth Second Louisiana Order*.<sup>56</sup>

19. Nevada Bell’s Track A showing relies upon a description of similarities between Cricket’s broadband PCS and traditional wireless service, a survey of Cricket’s customers in Nevada? and examples of Cricket Communications’ marketing strategy.” Cricket

<sup>55</sup> *BellSouth Second Louisiana Order*, 13 FCC Rcd at 20623-24, paras. 31-32. The Commission recognized that it may be difficult to determine whether a customer subscribes to broadband PCS as a complement to a wireline service or in place of a second line. *BellSouth Second Louisiana Order*, 13 FCC Rcd at 20623-24, para. 31, n.71.

<sup>54</sup> *BellSouth Second Louisiana Order*, 13 FCC Rcd at 20623-24, paras. 31-32.

<sup>55</sup> *BellSouth Second Louisiana Order*, 13 FCC Rcd at 20624, para. 32.

<sup>56</sup> *BellSouth Second Louisiana Order*, 13 FCC Rcd at 20628, para. 39.

<sup>57</sup> *BellSouth Second Louisiana Order*, 13 FCC Rcd at 20625-28, paras. 35-39.

<sup>58</sup> Nevada Bell Smith Aff. at paras. 14-21; Nevada Bell Supplemental Track A Reply Comments at 8-11; Nevada Bell Supplemental Track A Reply, Tab I, Reply Affidavit of J. Gar) Smith, at paras. 10-16 (*Nevada Bell Smith Reply Aff.*) Nevada Bell Supplemental Track A Reply, Tab 2, Keith Frederick Affidavit, at paras. 6-24 (*Nevada Bell Frederick Aff.*).

<sup>59</sup> The Commission has recognized in other contexts that substitution between wireless and local telephony service has increased, and that some broadband PCS carriers, and in particular Cricket Communications, have purposefully designed their service packages to compete directly with wireline local telephone service. *See In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order and Second Further Notice of Proposed Rulemaking, FCC 02-39, para. 21 (rel. Dec. 13, 2002); Federal Communications Commission, Seventh Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, FCC 02-179, at 32-36 (2002) (*Seventh CMRS Competition Report*); Federal Communications Commission, Sixth Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, FCC 01-192, at 32-34 (2001) (*Sixth CMRS Competition Report*). We note that Leap Wireless, Cricket (continued....)

Communications is a facilities-based broadband PCS provider operating in Reno, Sparks, and Carson City, Nevada.” As noted in Leap Wireless’ (Cricket Communications’ parent) press releases and Securities and Annual Report, Cricket service is marketed as a “landline replacement.”<sup>61</sup> As with residential wireline service, subscribers to Cricket pay a flat monthly fee for unlimited local calling from its service area in Nevada and for unlimited incoming calls, pay additional per-minute charges for outgoing long distance calls, and may subscribe to vertical features for an additional monthly charge.<sup>62</sup> We note that newspaper ads encourage consumers to replace their home phones with Cricket service and that the home web-page for Cricket directly markets this service as a substitute for residential local telephone service with a large print header inviting subscribers to “Get this home phone free.”” We find that, consistent with the *BellSouth Second Louisiana Order*, this evidence is persuasive in demonstrating that broadband PCS is being used to replace wireline service in Nevada.

20. In addition to Cricket’s marketing materials, Nevada Bell submits the results of a large, random telephone survey of Cricket’s subscribers in Nevada conducted by FrederickPolls.<sup>64</sup> We find the quality of that survey and the statistical methodology of the survey sufficient to establish that Cricket Communications is an actual commercial alternative to Nevada Bell for purposes of Track A compliance and that more than a *de minimis* number of consumers use Cricket broadband PCS service in lieu of Nevada Bell’s local wireline telephone service.<sup>65</sup> The FrederickPolls survey is consistent with the evidentiary framework established by the Commission in the *BellSouth Second Louisiana Order*. The Commission found that the persuasive value of any study of broadband PCS and wireline service competition would depend upon the quality of the survey and statistical methodology used in the study.<sup>66</sup>

(Continued from previous page)

Communications’ parent, reports that it has succeeded as a landline substitute as 26% of its customers do not subscribe to any traditional landline phone service at home, and that its customers use approximately 1,200 minutes per month, more than triple the industry average for PCS and cellular customers. Lener from Laurie Itkin, Director – Government Affairs, Leap Wireless, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 95-116, at 2 (filed Feb. 25, 2003).

<sup>60</sup> Nevada Bell Smith Aff. at para. 17; Nevada Bell Frederick Aff. at 5

<sup>61</sup> Nevada Bell Smith Aff, Attach. D (Leap Wireless 2001 Annual Report): *Leap Reports Results for Third Fiscal Quarter* of 2002 (Nov. 13, 2002); *Leaping over Landline: Leap Leads Wireline Displacement Trend*. (June 24, 2002).

<sup>62</sup> Nevada Bell Smith Aff. at para. 15-17; Nevada Bell Frederick Aff. at para. 5 n.1

<sup>63</sup> Nevada Bell Smith Aff, at 17. Nevada Bell Smith Aff., Attach E. We also take administrative notice that Cricket’s website invites subscribers to “Get this home phone free.” <http://www.cricketcommunications.com> (visited Feb. 27, 2002).

<sup>64</sup> Nevada Bell Frederick Aff. at para. 6-7.

<sup>65</sup> Nevada Bell Frederick Aff. at paras. 8-24.

<sup>66</sup> *BellSouth Second Louisiana Order*. 13 FCC Rcd at 20624. para. 32.

21. First, consistent with the framework established in the *BellSouth Second Louisiana Order*, the survey asks directly whether the Cricket billpayers have a wireline phone service in their home.<sup>67</sup> Specifically, the survey measures two types of replacement by Cricket users: (1) Cricket billpayers who do not now have wireline telephone service in their homes and (2) Cricket billpayers who do not now have wireline telephone service in their homes and had subscribed to such service prior to deciding to initiate Cricket service.<sup>68</sup> We reject WorldCom's criticism that respondents did not understand that the term "wireline" referred to traditional local telephone service because the word is immediately followed by the phrase "local telephone service in their home."<sup>69</sup> There is no reason to believe that the respondents, who are consumers of wireless phone service, are incapable of understanding the difference between wireless phone service, wireline phone service, and a cordless wireline phone. Moreover, if the respondent was unsure of what the term meant, the phrase "wireline local telephone service" was defined."

22. Second, the FrederickPolls survey is based on a randomly-selected **sample** of Cricket customers in Nevada." Third, we find that the survey results themselves establish a sufficient number of individuals to satisfy Track A requirements, eliminating the need to extrapolate from the survey results to the larger population of Cricket customers. In this respect, the survey conducted by FrederickPolls is significantly different than the survey proffered by BellSouth in the *Louisiana II proceeding*.<sup>72</sup> We conclude that the survey respondents that stated that they do not have a local wireline telephone in their home are sufficient to establish that Cricket is a commercial alternative to Nevada Bell and that more than a *de minimis* number of

<sup>67</sup> *BellSouth Second Louisiana Order*, 13 FCC Rcd at 20627-28, para. 39; Nevada Bell Frederick Aff. at para. 12; Nevada Bell Frederick AM., Attach. B.

<sup>68</sup> Nevada Bell Frederick Aff., at para. 6

<sup>69</sup> WorldCom Reply at 6; WorldCom Mar. 25 *Ex Parte* Letter at 5. We further reject WorldCom's arguments that the survey improperly suggested to the respondents that they had disconnected their wireline phone. *See* WorldCom Mar. 25 *Ex Parte* Letter at 5. As we state above, we find that the survey asked direct questions as required by the *BellSouth Second Louisiana Order*.

<sup>70</sup> Wireline local telephone service was defined as, "dial-tone phone service provided by your local phone company that allows you to make and receive phone calls by plugging your home phone into a wall-jack." Nevada Bell Frederick AM., Attach. B; Nevada Bell Supplemental Track A Reply at 6-7; Nevada Bell Frederick Aff., at para. 11.

<sup>71</sup> Cricket has been assigned 40,000 telephone numbers in Nevada Bell's service territory. Eight thousand telephone numbers were randomly selected from these 40,000 numbers. Calls were placed to these telephone numbers during the first week in February. Nevada Bell Frederick Aff. at paras. 9-12. The Commission has recognized that the randomness of any survey will be affected to some extent by the unwillingness of some parties to participate. *BellSouth Second Louisiana Order*, 13 FCC Rcd at 20627, para. 37, n.86.

<sup>72</sup> FrederickPolls determined that, of the 1,841 survey respondents, 912 Cricket customers do not currently have wireline telephone service in their homes, and 345 of the 912 customers indicated that they previously had wireline local telephone service that was disconnected or terminated because they decided to have a Cricket phone. Nevada Bell Frederick Aff. at paras. 19-23; Nevada Bell Frederick Aff., Attach. C at 1-5.

Cricket customers use Cricket in lieu of local wireline telephone service in Nevada for purposes of Track A compliance.<sup>73</sup>

23. We reject WorldCom's argument that, in the *BellSouth Second Louisiana Order*, the Commission sought a higher incidence of consumers using broadband PCS in lieu of wireline telephony than FrederickPolls survey indicates." The *BellSouth Second Louisiana Order* specifically excludes any discussion of a minimum level of substitution or replacement, and specifically notes that there is no market share test for entry under Track A.<sup>75</sup> As noted above, the Commission found that the most persuasive evidence is evidence that consumers are actually subscribing to broadband PCS in lieu of wireline service. Nevada Bell provides such evidence here.

24. We further reject WorldCom's attempt to extrapolate the Commission's criticism of a study submitted in BellSouth's second Louisiana application to support a conclusion here that the Commission was looking for a higher incidence of substitution than the FrederickPolls survey indicates.<sup>76</sup> In the *BellSouth Second Louisiana Order*, the Commission *did not* reject BellSouth's consumer studies because the number of survey respondents or the estimated number of consumers was too low. One study submitted by BellSouth was rejected because there were no assurances that **the** respondents were representative of the population which the survey sought to characterize (broadband PCS users in Louisiana), and the study disguised the complementary nature of the services." The other study submitted by BellSouth was rejected because the study was based on a price comparison of local wireline service and broadband PCS service that the Commission found flawed."

25. In contrast, the survey submitted in the instant application is based on a relatively large sample of Cricket customers in Nevada and purports only to make predictions about

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<sup>73</sup> We reject WorldCom's suggestion that Cricket's future is somewhat uncertain because it has recently been delisted from NASDAQ as there are no indications that Cricket is no longer operating in the market. Nevada Bell Track A Reply at 11n.6; WorldCom Comments at 6; WorldCom Reply at 7-8.

<sup>74</sup> WorldCom Reply at 6-7; WorldCom Mar. 25 *Ex Parte* Lener at 2

<sup>75</sup> *BellSouth Second Louisiana Order*, 13 FCC Rcd at 20623-32, paras. 31-43. We, therefore, also reject WorldCom's argument that the Commission should use standards other than section 211 statutory analysis to evaluate the ability of Cricket Communications to satisfy Track A. WorldCom Mar. 25 *Ex Parte* Lener at 4.

<sup>76</sup> WorldCom Reply at 6-7

<sup>77</sup> "Because the survey respondents were self-selected, rather than randomly selected, there can be no assurance that the respondent or their responses to the survey questions are generally representative of PCS customers in New Orleans ... Further, there is no evidence that the New Orleans respondents are similar to the state-wide PCS user population ... In order to be considered persuasive, future studies of this type should use a random sample or explain why the study results are meaningful without a random sample." *BellSouth Second Louisiana Order*, 13 FCC Rcd at 20627, para. 37. See also *id* at 20625-28, paras. 35-39.

<sup>78</sup> *BellSouth Second Louisiana Order*, 13 FCC Rcd at 20619-30, paras. 41-42

Cricket customers in Nevada.<sup>79</sup> We see no reason to believe that the survey respondents **are** not representative of Cricket customers in Nevada. Moreover, the Commission found the type of survey submitted in the instant application to be persuasive because it shows actual consumer behavior? and unlike the surveys submitted in the BellSouth second Louisiana application this survey does not hide the complementary nature of the services. Thus, we reject WorldCom's contention that the Commission sought a larger number of customers that substitute broadband PCS for wireline service than what is established by the survey submitted in the instant application." Accordingly, we find Nevada Bell compliant with Track A because it has demonstrated that Cricket Communications is an actual commercial alternative to Nevada Bell that serves more than a *de minimis* number of consumers in Nevada.

26. We note that the Cricket Communications directly markets this service as a substitute for residential local telephone service asking potential subscribers "is it a home phone or a mobile phone?" We find that, consistent with the *BellSouth Second Louisiana Order*, this evidence is persuasive in demonstrating that broadband PCS is marketed and provided as a replacement for wireline service in Nevada." Therefore, based on the entirety of the record in this proceeding, we find that Cricket is an actual commercial alternative to Nevada Bell's residential telephone service in Nevada, and that Cricket provides service to more than a *de minimis* number of residential subscribers in Nevada for purposes of establishing Track A compliance under section 271. We note that our consideration of Cricket Communications for Track A compliance does not mean that *all* Nevada Bell residential telephone exchange service consumers view the Cricket service as a commercial alternative to Nevada Bell's telephone exchange service. Our consideration is limited for the purposes of section 271 compliance.

### C. Checklist Item 2 – Unbundled Network Elements

27. Checklist item two of section 271 states that a BOC must provide "nondiscriminatory access to network elements in accordance with sections 251(c)(3) and 252(d)(1)" of the Act." Section 251(c)(3) requires incumbent LECs to provide "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." Section 252(d)(1) provides that a state commission's determination of the just and reasonable rates for

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<sup>79</sup> FrederickPolls randomly selected 8,000 telephone numbers from the pool of 40,000 telephone numbers assigned to Cricket in Nevada. Surveys were completed by 1,841 billpayers. Nevada Bell Frederick Aff. at paras. 8-10, 18.

<sup>80</sup> *BellSouth Second Louisiana Order*, 13 FCC Rcd at 20624, para. 32.

<sup>81</sup> WorldCom Reply at 6-7.

<sup>82</sup> Nevada Bell Smith Reply Aff. at 13.

<sup>83</sup> *BellSouth Second Louisiana Order*, 13 FCC Rcd at 20623-24, para. 31.

<sup>84</sup> 47 U.S.C. § 271(c)(2)(B)(ii).

<sup>85</sup> 47 U.S.C. § 251(c)(3).

**network** elements must be nondiscriminatory, based on the cost of providing the network elements, and may include a reasonable **profit**.<sup>86</sup> Pursuant to this statutory mandate, the Commission has determined that prices for UNEs must be based on the total element long run incremental cost (TELRIC) of providing those elements.<sup>87</sup>

**28.** In applying the Commission's TELRIC pricing principles in this application, we do not conduct a *de novo* review of a state's pricing determinations." We will, however, reject an application if "basic TELRIC principles are violated or the state commission makes clear errors in factual findings on matters so substantial that the end result falls outside the range that the reasonable application of TELRIC principles would **produce**."<sup>89</sup> We note that different states may reach different results that are each within the range of what a reasonable application of TELRIC principles would produce. Accordingly, an input rejected elsewhere might be reasonable under the specific circumstances here.

## **1. Pricing Unbundled Network Elements**

### **a. Background**

**29. *UNE Recurring Cost Proceedings*** The state proceedings that produced Nevada Bell's recurring rates for local loop, network interface device (NID), switching (local and tandem) and interoffice transmission (transport), and signaling commenced in September 1996, and concluded in July 2000.<sup>90</sup> These proceedings consisted of two phases: the model selection phase, and the inputs selection phase.

**30.** The Nevada Commission conducted proceedings and evidentiary hearings for its model selection phase during 1997. Nevada Bell filed its own econometric telecommunication network models and studies. The Nevada Commission, however, adopted the Hatfield (HAI) model submitted by AT&T as the model platform for developing UNE costs.<sup>91</sup> After selecting

<sup>86</sup> 47 U.S.C. § 252(d)(1).

<sup>87</sup> See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 15844-47, paras. 674-79 (1996) (*Local Competition Order*); 47 C.F.R. §§ 51.501-.515. The Supreme Court has upheld the Commission's forward-looking pricing methodology in determining the costs of UNEs. *Verizon Communications Inc. v. FCC*, 122 S.Ct. 1646, 1679 (2000).

<sup>88</sup> *Verizon Pennsylvania Order*, 16 FCC Rcd at 17453, para. 55 (citations omitted); see also *Sprint v. FCC*, 274 F.3d at 556 ("When the Commission adjudicates §271 applications, it does not – and cannot – conduct *de novo* review of state rate-setting determinations. Instead, it makes a general assessment of compliance with TELRIC principles.").

<sup>89</sup> *Verizon Pennsylvania Order*, 16 FCC Rcd at 17453, para. 55

<sup>90</sup> *Nevada Commission Order* at 28-31

<sup>91</sup> See *Nevada Commission Order* at 28-29.



the HAI model, the Nevada Commission conducted evidentiary hearings to determine the appropriate state-specific input values and assumptions during the summer of 1998.<sup>92</sup>

31. On February 1, 1999, the Nevada Commission adopted its first pricing order establishing the UNE recurring rates for Nevada Bell.<sup>93</sup> In this order, the Nevada Commission concluded that it employed a TELRIC methodology, and “succeeded in identifying inputs and obtaining TELRIC estimates” for Nevada Bell, consistent with the Commission’s UNE pricing methodologies and principles.”

32. On May 3, 1999, Nevada Bell filed a petition with the First Judicial District Court of the State of Nevada for the judicial review of the Nevada *Commission Pricing Order I*. This state litigation was removed to federal court, the U. S. District Court, District of Nevada, by AT&T.<sup>95</sup> On July 19, 2000, the court approved a settlement. Pursuant to the settlement agreement, the Nevada Commission has initiated a proceeding to reexamine UNE rates.<sup>96</sup> While this proceeding is pending, the UNE recurring rates established by the Nevada Commission using the HAI model remain in place.”

33. *UNENon-Recurring Cost (NRC) Proceedings* On December 15, 1999, Nevada Bell and AT&T filed competing NRC studies.<sup>98</sup> Subsequently, the parties began settlement discussions. The proceedings were resolved in two steps. First, the parties agreed to use as the nonrecurring rates for Nevada Bell the rates that resulted from the NRC proceedings before the

<sup>92</sup> Nevada Commission Order at 29

<sup>93</sup> Nevada Commission Order at 30; *In re Filing of Nevada Bell’s Unbundled Network Element (UNE) Cost Study*, P.U.C.N. Docket No. 98-6004 (Feb. 1, 1999) (Nevada Commission Pricing Order I). On May 11, 1999, the Nevada Commission modified certain aspect of the Nevada Commission Pricing Order I. See *In re Filing of Nevada Bell’s Unbundled Network Element (UNE) Cost Study*, P.U.C.N. Docket No. 98-6004 (May 11, 1999) (Nevada Commission Pricing Order II).

<sup>94</sup> Nevada Commission Pricing Order I at 19.

<sup>95</sup> Nevada Commission Order at 30

<sup>96</sup> Nevada Commission Order at 30

<sup>97</sup> *In re Petition of Nevada Bell Telephone Company for an Order Commencing a Proceeding to Determine Non Costs and Rates for Unbundled Network Elements*, P.U.C.N. Docket No. 00-7012 (Mar 19, 2001) (Nevada Commission Pricing Order V).

<sup>98</sup> See Nevada Commission Order at 31; *In re Filing by Nevada Bell of its Unbundled Network Elements (UNE) Nonrecurring Cost Study pursuant to the Order issued in Docket No. 98-6004*, P.U.C.N. Docket No. 99-12033. *Filing by AT&T Communications of Nevada, Inc. of its Nonrecurring Cost Study for Unbundled Network Elements (UNEs) purchased from Nevada Bell pursuant to the Order issued in Docket No. 98-6004*, P.U.C.N. Docket No. 99-12034, *Petition of Nevada Bell for Review and Approval of its Cost Study and Proposed Rates for Conditioning Digital Subscriber Line (DSL) Loops*, P.U.C.N. Docket No. 00-4001 (consolidated), Order (Oct. 4, 2000) (Nevada Commission Pricing Order III).

California Commission.'" The Nevada Commission approved the parties' stipulation, and thereby adopted final nonrecurring rates for most of Nevada Bell's UNEs.<sup>100</sup>

**34.** Second, with respect to nonrecurring rates for the remaining Nevada Bell's UNEs, the Nevada Commission conducted six days of evidentiary hearings, taking testimony from nine different witnesses, which comprised over 650 pages of transcripts and 39 hearing exhibits. On November 20, 2000, the Nevada Commission approved with specific modifications Nevada Bell's UNE NRC, loop qualification, and DSL line conditioning studies.'"

**35. *Interim rates.*** In the above-described proceedings, the Nevada Commission established final recurring and nonrecurring rates for the majority of Nevada Bell's UNE offerings. Nevada Bell states that, in addition to those UNE offerings, Nevada Bell had a limited number of UNE offerings for which the Nevada Commission has not yet established final recurring and nonrecurring rates.'" Nevada Bell has filed rates for these UNEs, and these rates have not been challenged. These rates are interim and subject to true-up pending the determination of final rates as part of the Nevada Commission's ongoing reexamination of UNE rates.'"

#### **b. Discussion**

**36.** Based on the evidence in the record, we find that Nevada Bell's UNE rates are just, reasonable, and nondiscriminatory as required by section 251(c)(3), and are based on cost plus a reasonable profit as required by section 252(d)(1). Thus, Nevada Bell's UNE rates satisfy checklist item two.

**37.** The Nevada Commission conducted extensive pricing proceedings to establish wholesale rates for UNEs.<sup>104</sup> It approved recurring rates by using a Nevada specific version of

<sup>99</sup> *Nevada Commission Pricing Order III* at 2. See also Nevada Bell Application App. A, Vol. 5, Tab 16, Affidavit of Thomas G. Ries (Nevada Bell Ries Aff.) at para. 74-81

<sup>100</sup> See *Nevada Commission Pricing Order III* at 3

<sup>101</sup> *In re Filing by Nevada Bell of its Unbundled Network Elements (UNE) Nonrecurring Cost Study Pursuant to the Order Issued in Docket No. 98-6001*, P.U.C.N. Docket No. 99-32033, *Petition of Nevada Bell for Review and Approval of its Cost Study and Proposed Rates for Conditioning Digital Subscriber Line (DSL) Loops*, P.U.C.N. Docket No. 00-4001 (consolidated). Order (Nov. 20, 2000) (*Nevada Commission Pricing Order IV*).

<sup>102</sup> See Nevada Bell Ries Aff. at para. 15

<sup>103</sup> See *Nevada Commission Order* at 78; Nevada Bell Ries Aff. at para. 91; Nevada Bell Jacobson Aff. at para. 31.

<sup>104</sup> *Nevada Commission Order* at 28-33, 78-79; *Nevada Commission Pricing Order I* at 22-24 (establishing recurring UNE rates); *Nevada Commission Pricing Order II* at 6 (modifying recurring UNE rates set in *Nevada Commission Pricing Order I*); *Nevada Commission Pricing Order III* at 3-4 (establishing nonrecurring rates); *Nevada Commission Pricing Order IV* at 11-12 (establishing additional non-recurring rates); *Nevada Commission Pricing Order V* at 2-3 (initiating a new proceeding to reexamine UNE rates). See also Department of Justice Evaluation at 2.

the HAI model advocated by AT&T. Competitive LECs agreed to the vast majority of the nonrecurring rates. The Nevada Commission concluded that Nevada Bell's UNE rates are just, reasonable, and nondiscriminatory as required by section 251(c)(3), and satisfy the requirements of checklist item two.<sup>105</sup> No party alleges that Nevada Bell's rates are inconsistent with TELRIC, or that the Nevada Commission committed TELRIC errors. Based on this record, we find that Nevada Bell has met its burden to show that its prices for UNEs satisfy the statutory mandate.

38. WorldCom alleges that Nevada Bell's UNE rates are high and exceed a benchmark comparison to the rates in California.<sup>106</sup> WorldCom does not, however, allege any specific TELRIC errors. Where our review consists of a stand-alone analysis of a BOC's rates, we do not engage in any benchmark comparison. Rather, we review the state's rate-setting methodology on its own merits. Our analysis is complete if it reveals that there are no basic TELRIC violations or clear errors on substantial factual matters.<sup>107</sup> There is no allegation in the record that the Nevada Commission committed TELRIC errors, nor does our own independent analysis reveal any inconsistencies with TELRIC principles as we have established and applied them. Thus, we need not perform a benchmark comparison to determine TELRIC compliance.<sup>108</sup> To do otherwise would undermine the importance of state-specific, independent analysis of rates for UNEs. It is important to recognize both that costs may vary between states and that state commissions may reach different reasonable decisions on matters in dispute while correctly applying TELRIC principles.<sup>109</sup> Accordingly, we find that Nevada Bell's current UNE rates satisfy the requirements of checklist item two.

<sup>105</sup> *Nevada Commission Order* at 78-79; *Nevada Commission Pricing Order I* at 6-10.

<sup>106</sup> WorldCom Comments at 8.

<sup>107</sup> *Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Georgia and Louisiana*, CC Docket No. 02-35, Memorandum Opinion and Order, 17 FCC Rcd 9015, 9034, paras. 24-25 (*BellSouth Georgia/Louisiana Order*); *Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Network Inc., and Verizon Select Services Inc. for Authorization to Provide In-Region, InterLATA Services in Vermont*, CC Docket No. 02-7, Memorandum Opinion and Order, 17 FCC Rcd 7625, 7639, para. 26 (*Verizon Vermont Order*); *Verizon Rhode Island Order*, 17 FCC Rcd at 3320, para. 38-39; *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6276, para. 82; *Application by Verizon New Jersey Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization to Provide In-Region, InterLATA Services in New Jersey*, CC Docket No. 02-67, Memorandum Opinion and Order, 17 FCC Rcd 12275, 12295, para. 49 (*Verizon New Jersey Order*). See also *WorldCom v. FCC*, 308 F.3d 1, 4 (D.C. Cir. 2002).

<sup>108</sup> Benchmarking is used for the limited purpose of providing confidence that a rate, despite its potential TELRIC errors, falls within the range that a reasonable application of TELRIC would produce. Failure to meet a benchmark, by itself, is not evidence that a state commission failed to reasonably apply TELRIC in setting UNE rates. See *BellSouth Georgia/Louisiana Order*, 17 FCC Rcd at 9035, para. 25.

<sup>109</sup> See e.g., *BellSouth Georgia/Louisiana Order*, 17 FCC Rcd at 9034-35, paras. 24-25; *Verizon Vermont Order*, 17 FCC Rcd at 7639, para. 26; *Verizon New Jersey Order*, 17 FCC Rcd at 12285, para. 17. See also *AT&T Corp. v. FCC*, 220 F.3d at 615.

## 2. Operations Support Systems

39. Based on the evidence in the record, we find, as did the Nevada Commission, "that Nevada Bell provides nondiscriminatory access to its OSS in Nevada." As we discuss below, Nevada Bell has shown that evidence concerning its OSS in California, which the Commission previously found to satisfy the requirements of checklist item two, should be considered in this proceeding.<sup>110</sup> No commenter has raised any concerns with Nevada Bell's OSS or with its reliance on evidence regarding California's OSS in this proceeding. We therefore discuss here the relevance of California's systems, and those performance areas involving minor discrepancies that require further consideration.

### a. Relevance of California's OSS

40. Consistent with our precedent, Nevada Bell relies in this application on evidence concerning its California OSS.<sup>111</sup> Specifically, Nevada Bell asserts that Pacific Bell's OSS in California are substantially the same as its OSS in Nevada and, therefore, evidence concerning Pacific Bell's OSS in California is relevant and should be considered in our evaluation of the Nevada OSS.<sup>112</sup> To support its claim, Nevada Bell submits a report from PricewaterhouseCoopers (PwC).<sup>113</sup> PwC evaluated the OSS functionality made available to support competitive LEC activity in Nevada and California in order to attest to Nevada Bell management's assertions that the OSS interfaces in Nevada and California are identical, and the personnel and work center facilities supporting the OSS "employ the same processes" in Nevada

<sup>110</sup> See *Nevada Commission Order* at 76.

<sup>111</sup> See Nevada Bell Application at 28-39: *see generally* Nevada Bell Application App. A, Vol. 3, Tab 10, Joint Affidavit of Stephen D. Huston and Beth Lawson (Nevada Bell Huston/Lawson Aff.); Nevada Bell Application App. A, Vol. 4a, Tab. 12, Affidavit of Gwen S. Johnson (Nevada Bell Johnson Aff.).

<sup>112</sup> *Pacific Bell California Order*, 17 FCC Rcd at 25685-707, paras. 72-101; *see also Verizon Rhode island Order*, 17 FCC Rcd at 3329-35, paras. 58-71.

<sup>113</sup> See Appendix D at para. 32.

<sup>114</sup> See Nevada Bell Application at 29-30: *see also* Nevada Bell Huston/Lawson Joint Aff. at para. 13; *SWBT Kansas/Oklahoma Order* 16 FCC Rcd at 6239, 6253-54, 6286, paras. 3.35-36, 107. In the *Pacific Bell California Order*, the Commission conducted a thorough analysis of the Cap Gemini Ernest & Young and General Electric Global Exchange Services testing of Pacific Bell's OSS functionalities. Specifically, the Commission evaluated Pacific Bell's ability to provide competitive LECs in California with nondiscriminatory access to pre-ordering, ordering, provisioning, maintenance and repair, and billing functionalities. The Commission held that the third-party test was broad and objective and supported the finding that Pacific Bell provided nondiscriminatory access to its OSS. See *Pacific Bell California Order*, 17 FCC Rcd at 25685, para. 73.

<sup>115</sup> See Nevada Bell Application App. C, Tab 5 I, Joint Declaration of Theodore V. Schaefer and James J. Murphy, on behalf of PricewaterhouseCoopers, *Petition for Review and Approval of Draft Application by SBC Communications Inc., et al., for Provision of In-Region IntraLATA Services in Nevada*, Docket No. 00-703 I (May 10, 2001) (PwC Decl.). See also *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6286, para. 107 (under the Commission's analysis, a BOC should support its claim of "sameness" through the submission of an attestation letter and a supplemental report from a third-party consultant).

as in California.”<sup>116</sup> Nevada Bell also submits declaratory evidence that competitive LECs operating in Nevada territory use common interfaces and gateway systems throughout the 13-state operating region.” We note that no commenter has raised any issues with respect to checklist item two, or suggested that evidence of Pacific Bell’s OSS should not be considered in this proceeding. We find that Nevada Bell, through the PwC Report and its declarations, provides evidence that the OSS in California are substantially the same as the OSS in Nevada and, therefore, evidence concerning the OSS in California is relevant and should be considered in our evaluation of Nevada Bell’s OSS in Nevada. Accordingly, when volumes in Nevada are too low to yield meaningful information concerning Nevada Bell’s compliance with the competitive checklist, we examine data reflecting Pacific Bell’s performance in California.

### b. Pre-Ordering

41. We conclude that Nevada Bell demonstrates that it provides nondiscriminatory access to its OSS pre-ordering functions. As discussed below, we find that while Nevada Bell’s performance data demonstrate a few scattered disparities for pre-ordering activity, such disparities do not constitute a significant impact on competitive entry in Nevada, and as such, do not warrant a finding of checklist noncompliance.”

42. Nevada Bell states that over the relevant five-month data period, the pre-ordering interfaces in Nevada generally met or exceeded the benchmarks for all but one of the sub-measurements established by the Nevada Commission pertaining to competitive LEC pre-ordering transactions.” Specifically, Nevada Bell acknowledges that it failed to meet the benchmark standard in Nevada for average response time to obtain telephone numbers for its Verigate interface in four out of the five relevant months.” Nevada Bell argues that new functionality and additional lookups for telephone numbers, as requested by competitive LECs,

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<sup>116</sup> See PwC Decl. at 6-10. After reviewing the electronic components of the OSS, PwC confirmed that, with the exception of four flow-through items confirmed by Nevada Bell’s management assertion, Nevada Bell and Pacific Bell are served by the same OSS or served by discernibly separate OSS that are identical or behave the same. The four flow-through items include orders for: Resale Conversions “As Is/With Changes”; certain resale services: 5db Loop Conversions “As Specific”; and “New Connects” for DSI loops. With respect to the manual components of the OSS, PwC and Nevada Bell confirmed that the similarities between the states will produce similar results. See *Nevada Commission Order* at 45.

<sup>117</sup> Nevada Bell Huston/Lawson Aff. at para. 5. Nevada Bell states that a uniform system has been established throughout SBC’s 13-state region since implementation of the Uniform and Enhanced Plan of Record (U&E POR).

<sup>118</sup> Nevada Bell Johnson Aff. at para. 55 n.17. See Appendix B: PM I (NV Average Response Time).

<sup>119</sup> Nevada Bell Application at 31. Nevada Bell states that its pre-ordering interfaces generally met or exceeded the benchmarks for all but one of the sub-measurements established by the Nevada Commission for responsiveness to competitive LEC pre-ordering transactions other than the loop qualification sub-measures.

<sup>120</sup> See PM 1-107101 (Average Response Time (to Pre-Order Queries) Mechanized Verigate – Request for Telephone Number).

contributed to the additional response time and poor performance results of this measurement.”” In addition, Nevada Bell provides that during the relevant five-month period, the average response times afforded to competitive LECs relative to this pre-order **query type** were approximately three seconds beyond the benchmark established by the Nevada Commission.”” In light of these explanations, and recognizing that no commenter raised any issues regarding Nevada Bell’s pre-ordering OSS, we conclude that Nevada Bell provides access to its pre-ordering functionality in a manner that allows competitive LECs a meaningful opportunity to compete.

**c. Ordering and Provisioning**

43. Based on the evidence in the record, we find that Nevada Bell provides competitive LECs with access to OSS ordering and provisioning functions. on a timely and consistent basis and in a manner that allows these carriers a meaningful opportunity to compete. with few exceptions.”” As stated above, however, Nevada Bell’s performance data demonstrate generally low volumes for Nevada’s ordering and provisioning functionality over the relevant five-month period.”” We therefore examine data reflecting Pacific Bell’s performance in California as a means of assessing Nevada Bell’s compliance with this checklist item. Our analysis indicates that while Pacific Bell fails to satisfy the relevant benchmark and parity standard for several performance measurements. we find that these misses generally are isolated and slight, and thus do not warrant a finding of checklist noncompliance. Two metrics relating to

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Nevada Bell Huston/Lawson Aff. at para. 23. SBC implemented a Uniform and Enhanced Plan of Record (U&E POR) throughout its 13 state region. Nevada Bell argues that the U&E POR additional functions, such as providing telephone number pooling status and supporting true telephone number reservation, require more processing for the inquiry, which increases the overall turnaround time. Nevada Bell also notes that to accommodate the enhanced capabilities provided by this pre-order query type. it plans to propose a benchmark change to 95% within 10 seconds for 2003. See Nevada Bell Johnson Aff. at para. 55, n.18.

<sup>122</sup>

Nevada Bell Johnson Aff. at para. 55. We note that the average response time afforded to competitive LECs relative to this pre-order query type was approximately 7.5 seconds, which was just a few seconds beyond the benchmark of 4.5 seconds. In addition. we note that. with the exception of November. there was an improving trend over the relevant five-month period with Nevada Bell meeting the benchmark standard in January.

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See Appendix B; *see also* PM 2 (NV Average FOC/LSC Notice Interval); PM 2 (CA Average FOC/LSC Notice Interval); PM 3 (CA Average Reject Notice Interval); PM 6 (CA Average Jeopardy Notice Interval); PM 15a (CA Average Time to Restore Provisioning Troubles - Service Order Completion); and PM 16 (CA Percentage Troubles in 30 Days for Special Service Orders). We acknowledge that Nevada Bell has encountered some difficulties in its flow-through performance. We note, however, that the Commission has stated that flow-through is not the sole indicator of non-discriminatory OSS. Specifically, the Commission found that a BOC’s ability to return timely order confirmation and rejection notices, accurately process manually handled orders, and scale its system is more relevant than a single flow-through analysis. See *BellSouth Georgia/Louisiana* Order 17 FCC Rcd at 9092. para. 143; *Bell Atlantic New York* Order, 15 FCC Rcd at 4034-35. para. 162. The Nevada Bell application demonstrates that Nevada Bell returns timely order confirmation and reject notices. accurately processes manually handled orders, and scales its system. See Nevada Bell Johnson Aff. at para. 75.

<sup>124</sup>

See *supra* para. 40

Pacific Bell's ordering and provisioning functionality in California, however, warrant further discussion, which we provide **below**.<sup>125</sup>

44. First, we note that Pacific Bell failed to meet the benchmark standard in California in three out of the five relevant months for returning timely Firm Order Confirmations (FOC) for electronically received LJNE-P orders.<sup>126</sup> Nevada Bell argues that Pacific Bell's performance failures on this metric for two of the relevant months were caused by a series of system failures experienced by one major competitive LEC on its own electronic interfacing system.” Given this evidence, and recognizing that Pacific Bell's performance disparities are slight for this metric, we find that these misses do not warrant a finding of checklist noncompliance.

45. Second, as in previous section 271 orders, we give substantial weight to missed commitment measures as an indicator of provisioning timeliness.” We note that Pacific Bell failed to provide competitive LECs with timely notices that it would miss a scheduled installation date, and the performance data show that it has fallen short of the benchmark standard for this measure for each of the five relevant months for UNE-P.<sup>129</sup> However, the missed committed due dates were a very small percentage of competitive carriers' total UNE-P orders completed in California. Furthermore, as we determined in the *Pacific Bell California Order*, Pacific Bell demonstrated timely performance for total UNE-P orders completed for each of the relevant

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<sup>125</sup> See PM 2-202200 (CA Average FOC/LSC Notice Interval UNE-P); and PM 6-652000 (CA Average Jeopardy Notice Interval –Missed Commitment – UNE-P).

<sup>126</sup> See PM 2-202200 (CA Average FOC/LSC Notice Interval UNE-P). Pacific Bell missed the .33 minute benchmark standard for September, October, and November. The competitive LEC results for September, October, November, December, and January were 0.42, 0.40, 0.50, 0.23, and 0.23, respectively. We note Nevada Bell's assertion that it consistently met or exceeded the applicable benchmark standard for measure 2. However, Nevada Bell's Average FOC Notice Interval for UNE-P – PM 202201 demonstrates extremely low volumes. As such, we are obligated to look to Pacific Bell's performance measures for this ordering provision. See Nevada Bell Johnson Aff. at para. 63.

<sup>127</sup> Letter from Colin S. Stretch, SBC Communications, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 03-30, Attach. at 6 (filed Feb. 19, 2003) (SBC Feb. 19 *Ex Parte* Letter). The Applicant claims that the system problems of one competitive LEC continued over a number of weeks in late September and early October. Nevada Bell states that Pacific Bell attempted to work with this particular competitive LEC to ensure a progressive flow of orders once its interface system was again functional. However, on more than one occasion, the competitive LEC sent a large volume of backlogged service requests in a very short time frame, thus slowing processing on Pacific Bell's side of the ordering interface. Nevada Bell contends that, upon reviewing the data, the particular competitive LEC agreed that its actions were the primary cause of the performance shortfalls in September and October.

<sup>128</sup> See *Pacific Bell California Order*, 17 FCC Rcd at 25692-94, paras. 84-85. See also *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6307-08, paras. 147-49.

<sup>129</sup> See Appendix C, PM 6-652000 (CA Average Jeopardy Notice Interval – Missed Commitment – UNE-P). Jeopardy notices alert customers when Pacific Bell misses a committed due date, and Pacific Bell should provide 95% of missed commitment notices to competitors within 24 hours.

months.<sup>130</sup> Accordingly, we find that Nevada Bell, pursuant to its own performance and the performance of Pacific Bell in California, provides competitive LECs with sufficient access to the ordering and provisioning functions of its OSS.

#### d. Maintenance and Repair

46. We conclude that Nevada Bell provides competitive LECs with nondiscriminatory access to maintenance and repair OSS functions in substantially the same time and manner as Nevada Bell's retail operation, and restores services to competing carriers' customers in substantially the same time and manner and with a similar level of quality as it restores service to its own customers." Furthermore, we find that Nevada Bell satisfied the applicable parity or benchmark standard for each major performance measurement with few exceptions."

47. As noted above, however, in light of Nevada Bell's generally low volumes for its performance measures, we supplement our analysis using Pacific Bell's maintenance and repair functionality in California in order to ensure checklist compliance in Nevada." A review of these measures indicates that Pacific Bell has missed parity in California for certain UNE-P maintenance troubles during the relevant five-month period." The Applicant acknowledges

<sup>130</sup> Total UNE-P orders completed for this period were 124,691 in September, 188,198 in October, 170,602 in November, 190,692 in December, and 208,251 in January. Appendix C, PM 11 (CA Percent of Due Dates Missed, UNE-P.) Based on these data, Pacific Bell missed less than 1% of committed due dates during the period of September through January 2002. As we stated in the *Pacific Bell California Order*, we view Pacific Bell's performance issuing timely missed commitment notices within the broader context of Pacific Bell's high rate of on-time performance provisioning UNE-P orders, and therefore do not find these disparities to be competitively significant. See *Pacific Bell California Order*, 17 FCC Rcd at 25692-93, para. 84.

<sup>131</sup> See *BellSouth Georgia/Louisiana Order*, 17 FCC Rcd at 9111, para. 169; *Bell Atlantic New York Order*, 15 FCC Rcd at 4067, para. 211.

<sup>132</sup> See Appendix B.

<sup>133</sup> See *supra* para. 40. We note, that an evaluation of Pacific Bell's California performance measurements is supplemental to our Nevada Bell analysis of checklist compliance. As such, less weight may be provided towards California's performance measurement analysis. We nevertheless find Pacific Bell's explanations of its performance failures to be both helpful and satisfactory in our analysis of Nevada Bell's application.

<sup>134</sup> See PM 19 (CA Customer Trouble Report Rate); PM 20 (CA Percentage of Customer Trouble Not Resolved Within Estimated Time); PM 21 (CA Average Time to Restore); PM 23 (CA Frequency of Repeat Troubles in 30-Day Period). Pacific Bell missed parity all five of the relevant months for PM 19-3600. The comparable percentages were 0.71, 0.89, 1.43, 1.32, and 1.14 for competitive LECs, and 0.17, 0.49, 0.73, 0.71, and 0.69 for Pacific Bell. Pacific Bell also missed parity for November and January for PM 10-1097201. The comparable percentages for November and January were 18.75 and 15.79 for competitive LECs and 15.63 and 14.95 for Pacific Bell, respectively. Furthermore, Pacific Bell missed all five of the relevant months for PM 21-2197401. The comparable percentages were 9.11, 8.32, 17.29, 16.14, and 12.87 for competitive LECs, and 7.52, 7.37, 14.91, 15.21, and 11.98 for Pacific Bell. Finally, Pacific Bell missed all five of the relevant months for PM 23-2393600. The comparable percentages were 9.15, 8.65, 8.71, 10.34, and 11.21 for competitive LECs, and 7.18, 7.7, 7.13, 8.76, and 9.21 for Pacific Bell. We note in the *Pacific Bell California Order*, that the Department of Justice raised concerns with Pacific Bell's failure to achieve parity with respect to these three metrics. After thoroughly examining Pacific Bell's performance, we determined that those misses were not competitively significant. Similarly, we find (continued....)



these disparities, and argues that UNE-P maintenance troubles in California **are** significantly affected by the manner in which the parity comparison currently is defined in the maintenance performance **measures**.<sup>135</sup> For example, the Applicant states that a parity comparison of UNE-P maintenance services with retail business services in California affects Pacific Bell's ability to achieve parity for the Average Time to Restore UNE-P sub-measure.'" As a response to this problem, the Applicant states that Pacific Bell has implemented prioritization of competitive LEC UNE-P troubles, paying special attention to those troubles that might be carried over to the next business day.'" After analyzing Pacific Bell's performance on this measurement, we find that the disparity in California for the Average Time to Restore reflects a minimal percentage difference between competitive LECs and Pacific Bell's retail customers. As such, we find these misses to be competitively insignificant, and that lack of parity does not warrant a finding of checklist noncompliance.

**48.** Finally, we recognize that Pacific Bell's performance measurement for Frequency of Repeat Troubles in a 30-Day Period for UNE-P has failed to meet parity with the retail analogue all five of the relevant months.'" The Applicant acknowledges the performance disparity, and states that, as of December 2002, Pacific Bell has implemented new procedures for both repeated troubles associated with features on the UNE-P service and troubles on the UNE-P

(Continued from previous page)

these misses are not competitively significant in this instance. We will, however, continue to monitor Pacific Bell's performance in this area for compliance with the conditions of approval in this order. *See Pacific Bell California Order* 17FCC Rcd at 25695, para. 87.

<sup>135</sup> *See* Nevada Bell Application App. A, Vol. 5, Tab 13, Joint Affidavit of Richard J. Motta and Richard P. Resnick (Nevada Bell Motta/Resnick Aff.). Nevada Bell admits that the issue regarding UNE-P maintenance troubles in California has significantly contributed to parity shortfalls for measure 19 – Customer Trouble Report Rate -- and for measure 21 – Average Time to Restore. Nevada Bell explains that Pacific Bell has proposed a change to the analogue for all UNE-P provisioning and maintenance measures to "all retail POTS services." Nevada Bell claims that had Pacific Bell assessed parity for UNE-P services against the total base of retail services, parity would have been achieved in each of the past three months. *Id.* at para. 20.

<sup>136</sup> *See* PM 21-2197401(CA Average Time to Restore – UNE Platform-Basic Port and (8db and 5.5db) Loop). Nevada Bell states that Pacific Bell has analyzed the results for this sub-measure and found that for UNE-P services, troubles were reported about 20% of the time after 5:00p.m., while for the retail analogue, business POTS, trouble reports were submitted after 5:00p.m. only 10% of the time. According to Nevada Bell, the significance of this finding is that troubles reported near the end of the business day are less likely to be resolved the same day and more frequently carried over to the next day for resolution. As a result, Nevada Bell concludes that on average, trouble restoral times will be slightly longer for residential services as compared to business services. *See* Nevada Bell Motta/Resnick Aff. at para. 23.

<sup>137</sup> *See* Nevada Bell Motta/Resnick Aff. at para. 24. The Applicant states that from September 2002 through November 2002, average restoral times for basic UNE-P services in California were one to three hours longer than for the retail analogue. While this difference is unlikely to have compromised competitive LECs' opportunities to compete, the Applicant states that it has sought to mitigate the effects of the disparity. As such, it has implemented the prioritization of competitive LEC UNE-P troubles.

<sup>138</sup> *See* PM 23-2393600(CA Frequency of Repeat Troubles in 30-Day Period-UNE-P). Pacific Bell missed parity all five of the relevant months. The comparable percentages here 9.15, 8.65, 8.71, **10.34**, and 11.21 for competitive LECs, and 7.18, 7.57, 7.13, 8.76, and 9.21 for Pacific Bell.

facility.'" Given the generally acceptable performance for **all other** categories of maintenance and repair and the absence of complaints about these categories in this record or before the Nevada Commission, and recognizing the small percentage disparity with this measurement, we find that these slight performance issues do not warrant a finding of checklist noncompliance. However, we will continue to monitor performance measurements in this area for compliance with the conditions of approval in this order. Should we find that performance disparities continue to exist or grow worse, we will not hesitate to initiate enforcement mechanisms under section 271(d)(6) of the Act.

#### IV. OTHER CHECKLIST ITEMS

##### A. Checklist Item 4 – Unbundled Local Loops

49. Section 271(c)(2)(B)(iv) of the Act requires that a BOC provide "[l]ocal loop transmission from the central office to the customer's premises. unbundled from local switching or other services."<sup>140</sup> Based on the evidence in the record," we conclude, as did the Nevada Commission," that Nevada Bell provides unbundled local loops in accordance with the requirements of section 271 and our rules. We also note that no commenter challenges Nevada Bell's showing on this checklist item or the California evidence that it relies upon.

50. As of January 2003, competitors have acquired and placed into use approximately 7,200 stand-alone loops (including DSL loops) from Nevada Bell in Nevada." Consistent with prior section 271 orders, we do not address every aspect of an applicant's loop performance where our review of the record satisfies us that the applicant's performance complies with the parity and benchmark measures established by the state at issue. in this case Nevada." Instead, we focus our discussion on those areas where the record indicates discrepancies in performance

<sup>139</sup> The Applicant describes the new procedures as follows: To ensure that feature-related troubles are resolved on the initial trouble report. when troubles of this type are reponed. Pacific Bell's technicians will first verify that the feature is provisioned in its switch. If it is not. Pacific Bell's technicians will then provision the feature. If the feature does appear in the switch. technicians will test in the central office to validate that the feature *is* functional. If the feature appears not to be working at the central office, a switch translations technician will "refresh" the feature in the main memory of the switching machine. The feature will then be verified to ensure it is working correctly before the trouble ticket *is* closed.

<sup>140</sup> 47 U.S.C. § 271(c)(2)(b); see also Appendix D at paras. 48-52 (regarding requirements under checklist item four).

<sup>141</sup> See Nevada Bell Application at 40-53; see generally Nevada Bell Johnson Aff.; Nevada Bell Application App. A. Vol. I, Tab 2. Affidavit of Carol A. Chapman (Nevada Bell Chapman Aff.); see also Appendices B, C.

<sup>142</sup> See Nevada Commission Order at 137

<sup>143</sup> See Nevada Bell Application at 41 (noting that Verizon had provisioned approximately 750 loops in Vermont and BellSouth had provisioned 3,841 loops in Kentucky and 6,758 loops in Mississippi at the time those BOCs filed their section 271 applications for those states); Nevada Bell Smith Aff. Attach. A. D.

<sup>144</sup> See Verizon Connecticut Order. 16 FCC Rcd at 14151-52, para. 9.